the creditor, and consequently concluded that a surety who had paid the full amount of the debt after an action against his co-surety was barred, could not compel contribution. As this right rests upon a promise implied in law based upon the equitable conception that sureties who stand in the same relation to a principal must bear equally the burdens of the situation,[18] it would seem that where the claim was no longer enforceable against one of the sureties, the equities upon which a promise could be implied would be non-existent and that the decision reached by the court is but a logical application of the doctrine of contribution.[19]

INSANITY AND THE ADEMPTION OF LEGACIES.—In determining the rights predicable upon a bequest the subject matter of which is not in existence at the death of the testator, it becomes necessary to ascertain the precise character of the gift that has been made. If it is a general legacy the doctrine of ademption, which declares that in such an event the legatee's rights are destroyed, obviously has no application for such a gift does not depend upon the continued existence of any designated thing.[1] In a like manner it is important to distinguish those cases in which the legacy may properly be termed demonstrative, as where the testator refers to a particular part of his estate only for the purpose of indicating the most convenient means by which to discharge the gift.[2] His expressions are, under such circumstances, merely descriptive of the amount and value of the bequest and the non-existence of the fund referred to cannot operate to extinguish the donee's rights.[3] To the extent, then, that it determines the exact nature of the legacy and the consequent applicability of the doctrine of ademption, the testator's intent is decisive. Although the decisions are by no means unanimous upon the question, some courts have ascribed to it an equally important role at the time when the subject matter of the gift is destroyed or converted into something else.[4] Thus it has been held that if the testator compelled payment of a debt which was the subject of a bequest the legacy was adeemed[5] whereas if such payment was voluntary on the debtor's part the legatee might still assert his right as to the proceeds of the conversion.[6] Under this theory the ultimate determination of whether or not there has been an ademption

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[18]Deering *v.* Earl of Winchelsea (1800) 2 Bos. & Pul. 270; Monson *v.* Drakeley (1873) 40 Conn. 552; see Dennis *v.* Gillespie (1852) 24 Miss. 581; Wells *v.* Miller (1876) 66 N. Y. 255; Glasscock *v.* Hamilton (1884) 62 Tex. 143; Chaffee *v.* Jones (Mass. 1837) 19 Pick. 260; Warner *v.* Morrison (Mass. 1862) 3 Allen 566.

[19]Cocke *v.* Hoffman (Tenn. 1880) 5 Lea 105; but see Bright *v.* Lennon (1880) 83 N. C. 183.

[1]See Langdon *v.* Astor's Exrs. (N. Y. 1854) 3 Duer 477.

[2]Byrne *v.* Hume (1891) 86 Mich. 546; Giddings *v.* Seward (1857) 16 N. Y. 265.

[3]Corbin *v.* Mills (Va. 1869) 19 Gratt. 438; Giddings *v.* Seward *supra;* see Morris *v.* Garlands Adm'rs. (1883) 78 Va. 215.

[4]Birch *v.* Baker (1730) Mosely 373; Partridge *v.* Partridge (1736) Cas. Temp. Talb. 226.

[5]See Coleman *v.* Coleman (1795) 2 Ves. 639.

[6]Drinkwater *v.* Falconer (1755) 2 Ves. 623; see Coleman *v.* Coleman *supra.*

is controlled by the nature of the inference which the court will draw from the donor's act.[7] The impracticability of this test as a working rule is evidenced by the fact that opposite conclusions have been reached under practically identical circumstances.[8]

But apart from the difficulties necessarily attendant upon the application of this theory, principle would not demand an inquiry into the purpose of the testator. The very terms of the gift obviously require that nothing other than the thing described should be applied in satisfaction of the legacy and any substitution by the court would seem not only inconsistent with the very nature of a specific bequest but also ineffectual as an attempt ot carry out the intent of the testator as expressed in his will.[9] Moreover, even if it be found that he desired to preserve the proceeds of the conversion to his legatee it is difficult to see how such a purpose could be effective in the absence of a sufficient memorandum thereof to satisfy the Statute of Wills in England[10] and similar statutes in this country. It would seem, therefore, that the mere non-existence of a subject matter upon which the will could act in accordance with the directions of the testator would be sufficient to work an ademption of the legacy and such has been the attitude of the more recent decisions.[11]

Although most of the American courts have acceeded to this view[12] there is, nevertheless, a tendency to relieve from the operation of the rule those cases in which its literal application would work an apparent hardship to the legatee.[13] This tendency is evidenced by the decision in a recent case, *Wilmerton* v. *Wilmerton* (1910) 176 Fed. 896 holding that a legacy the specific subject matter of which had become non-existent during the testator's insanity was not adeemed. The court, apparently admitting that the cases which had been brought to its attention were opposed to such a view,[14] preferred nevertheless to make intent determinative of the question. Although pure considerations of justice would appear to demand some remedy in such a situation it is to be observed that the common law has made no exception in cases of insanity and that it has required an Act of Parliament in England to make possible the result reached by the Federal court.[15] It would seem, therefore, that in view of the more recent doctrine that ademption is a conclusion of law resulting from considerations paramount to the purpose of the testator,[16] the decision is scarcely supportable on principle. Surely, in the absence of legislation on the subject, the open recognition of an exception to the general rule in cases of

[7]White *v.* Winchester (Mass. 1827) 6 Pick. 48; Drinkwater *v.* Falconer *supra.*

[8]See Humpries *v.* Humpries (1789) 2 Cox E. C. 184; Stanley *v.* Potter (1789) 2 Cox E. C. 180.

[9]Beck *v.* McGillis (N. Y. 1850) 9 Barb. 35; Fryer *v.* Morris (1804) 9 Ves. 360; Updike *v.* Tompkins (1881) 100 Ill. 406.

[10]See Freer *v.* Freer (1882) L. R. 22 Ch. Div. 622.

[11]Slater *v.* Slater L. R. [1907] 1 Ch. 665; Freer *v.* Freer *supra.*

[12]Beck *v.* McGillis *supra;* Richards *v.* Humphrews (1833) 32 Mass. 133; Updike *v.* Tompkins *supra; In re* Tillinghast (1901) 23 R. I. 121; Beale *v.* Blake (1854) 16 Ga. 119 *contra.*

[13]Patton *v.* Patton (N. C. 1856) 2 Jones Eq. 494.

[14]Hoke *v.* Herman (1853) 21 Pa. St. 301; Freer *v.* Freer *supra.*

[15]Lunacy Act of 1890.

[16]Blackstone *v.* Blackstone (Pa. 1834) 3 Watts. 335.

mental incompetency would seem less undesirable than a recurrence to the theory that ademption is controlled by the testator's intent at the time of the destruction or conversion of the gift.

DAMAGES RECOVERABLE FOR THE INFRINGEMENT OF A PATENT.—The infringement of a patent subjects the defendant to two totally dissimilar and independent liabilities. At law his obligation, like that of the ordinary tort feasor, is to compensate the plaintiff for all the injury sustained.[1] In equity, on the other hand, he is treated as a trustee who has misused trust property, and consequently must account for all the fruits of his wrongful act.[2] This distinction is in no way affected by the statutory power[3] recently vested in courts of equity to award legal damages as well as the profits made by the defendant,[4] and even now the considerations determinative of the one should not control as to the other.

In ascertaining the amount of the plaintiff's injury, little difficulty is experienced in those cases in which the patentee permits the use of his invention by the public upon the payment of a license fee or royalty, which is sufficiently established at the time of the infringement to be fairly denominated the market value of that use. Manifestly under these circumstances the only injury inflicted upon him, is the non-payment of that sum.[5] Such fee or royalty must, however, be established as a fact, and cannot be based upon a mere inference by the jury as to what would be a reasonable one under the circumstances, for otherwise it is not a sufficiently definite standard of computation to satisfy the peculiar rigor with which the courts insist upon proof of actual damages.[6] Even an established royalty has been held to be an improper measure of damages where the infringement was of short duration.[7] This result would seem to rest upon a confusion of the elements determining damages at law and profits in equity, and might well be criticised as ignoring the fact that the plaintiff had a right to insist that his invention should not be used at all except upon payment of the usual royalty. If, on the other hand, a patentee finds his profit in monopolizing the invention, it is obvious that he must prove his damages by more general evidence, such as loss of sales,[8] or reduc-

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[1]Goodyear *v.* Bishop (1861) 10 Fed. Cas. No. 5559; see Beach *v.* Hatch (1897) 153 Fed. 763.

[2]Root *v.* Railway Co. (1881) 105 U. S. 189; Tilghman *v.* Proctor (1887) 125 U. S. 136.

[3]R. S. § 4921.

[4]See Birdsall *v.* Coolidge (1876) 93 U. S. 64; Coupe *v.* Royer (1895) 155 U. S. 565. The statute simply gives a plaintiff who is properly in equity the right to elect to have his damages assessed according to legal rules, where the defendant's profits are inadequate to redress the injury sustained. See Yesbera *v.* Hardesty Mfg. Co. (1908) 166 Fed. 120.

[5]Hogg *v.* Emerson (1850) 11 How. 587; Mayor etc. *v.* Ransom (1859) 23 How. 487; Rude *v.* Westcott (1889) 130 U. S. 152; Houston, H. & S. T. Ry. Co. *v.* Stern (1896) 74 Fed. 636.

[6]See Seymour *v.* McCormick (1853) 16 How. 480; Philp *v.* Nock (1873) 17 Wall. 460, holding that damages must be actual.

[7]Birdsall *v.* Coolidge *supra;* Seymour *v.* McCormick *supra;* see Royer *v.* Schultz Belting Co. (1891) 45 Fed. 51; appeal dismissed in Royer *v.* Schultz Belting Co. (1893) 154 U. S. 515.

[8]Zane *v.* Peck (1882) 13 Fed. 475; Blake *v.* Greenwood Cemetery (1883) 16 Fed. 676; Rose *v.* Hirsch (1899) 94 Fed. 177.